A **RONALD PHILIP DEVEREUX & ANOR**

v.

MAJLIS PERBANDARAN LANGKAWI BANDARAYA PELANCONGAN & ORS

B

HIGH COURT MALAYA, ALOR SETAR
SEE MEE CHUN JC
[CIVIL SUIT NO: 22-91-2011]
9 MAY 2012

C

ADMINISTRATIVE LAW: *Remedies - Judicial review - Liability of president and secretary of local authority - Whether action ought to be brought by way of judicial review or relator action - Rules of the High Court 1980, O. 53 - Government Proceedings Act 1956, s. 8(1)*

D

CIVIL PROCEDURE: *Contempt of court - Order of committal, application for - Failure to comply with consent judgment - Liability of president and secretary of local authority as alleged contemnors - Whether alleged contemnors conferred protection under ss. 31 and 125 of Local Government Act 1976*

E

LAND LAW: *Conveyancing - Foreign purchaser - Whether non-citizens require approval of state authority to execute sale and purchase agreement - National Land Code, s. 433B(1)(b)*

F The plaintiffs, Australian citizens who had purchased two units in Kondo Istana, sought an order for committal against the first defendant ('D1') for failure to comply with the consent judgment obtained on 12 July 2011 which was served personally on D1's Yang di Pertua ('YDP'), Zabudin bin Hat ('ZH') and the
G secretary, Mahamad Suhaimi bin Man ('MS'). The consent judgment required D1 to revoke approvals granted including building plan approval, demolish illegal and unauthorised structures and to provide documents in relation to Kondo Istana. On 30 January 2012, the court granted leave for an order of
H committal against the YDP and the secretary. The plaintiffs filed their application in encl. 52 for ZH and MS to be committed to prison for contempt of court. Enclosure 57 was filed by ZH and MS to set aside the plaintiffs' application. The issues that arose were, *inter alia*: (i) whether ZH and MS were liable to be cited as
I alleged contemnors and whether ZH and MS were conferred any protection by virtue of ss. 31 and 125 of the Local Government

Act 1976 ('the Act'); (ii) whether non-citizens needed the approval of the state authority to execute a sale and purchase agreement ('SPA') and deed of assignment ('DOA'); and (iii) whether the action should have been commenced by way of judicial review or relator action.

Held (allowing encl. 52 and dismissing encl. 57):

(1) The notice of motion for contempt naming ZH and MS as alleged contemnors was in order as they were the persons responsible for ensuring compliance of the consent judgment pursuant to s. 10 and s. 25 of the Act. It was not material that the YDP was appointed after the consent judgment was entered as he was responsible by virtue of being the current YDP. Sections 31 and 125 of the Act does not confer protection to ZH and MS as it deals with the validity of their act if their appointments were defective and protection from personal liability. (paras 4 & 5)

(2) Section 433B(1)(b) of the National Land Code ('NLC') was not applicable as strata titles had not been issued. Hence, no approval from the state authority was required for the execution of SPA and DOA. Section 433B(1)(b) of the NLC only applied to "dealings" and does not apply to the execution of SPA and DOA. The plaintiffs had acquired rights to the units in Kondo Istana by virtue of the SPA and DOA. (paras 11 & 12)

(3) The plaintiff sought to protect both propriety and private law rights and therefore O. 53 of the Rules of the High Court 1980 application was not appropriate. The plaintiffs' right in action was independent of s. 8(1) of the Government Proceedings Act 1956 as their proprietary and private law rights were effected. Their claim was founded on breach of law and not solely on nuisance. Hence, a relator action was also not appropriate. (paras 14 & 17)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Jalaludeen Abdul Aziz v. Thrumalingam S Rajadurai & Anor [2001] 7 CLJ 578 HC ***(foll)***

UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Berhad and Other Appeals [2007] 5 CLJ 489 CA ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal [1993] 3 CLJ 210 SC ***(foll)***

Legislation referred to:
Government Proceedings Act 1956, ss. 6, 8(1), (2), 29(2)
Local Government Act 1976, ss. 2, 10(1), 13, 25(1), 31, 101(p)(ii), 125
National Land Code, ss. 52, 433B(1)(b)
Public Authorities Protection Act 1948, s. 2(9)
Rules of the High Court 1980, O. 52 r. 5A, O. 53

For the plaintiffs - Karin Lim Ai Ching (Murgan D Maniam with her); M/s Presgrave & Matthews
For the alleged contemnors - Terrance Simon Marbeck (CK Goh with him); M/s Goh Rafidah Tan

Reported by Sandra Malini Gabriel

JUDGMENT

See Mee Chun JC:

[1] On 12 July 2011 a consent judgment was entered into between the plaintiffs and the first defendant (D1). The consent judgment in relation to Kondo Istana essentially requires D1 to revoke approvals granted including building plan approval, to demolish illegal and unauthorised structures and to provide documents. The consent judgment was served personally on D1's Yang di Pertua (YDP) Zabudin bin Hat (ZH) and the Secretary (Mahamad Suhaimi bin Man) (MS). On 30 January 2012 leave for an order of committal against YDP and the Secretary was granted by the court. The plaintiffs then filed its application in encl. (52) that ZH and MS be committed to prison for contempt of court. Enclosure (57) is the application of ZH and MS to set aside the plaintiff's application of encl. (52).

Prima Facie Case For Contempt

[2] As stated leave to issue committal proceedings was granted on 30 January 2012 which means there was a *prima facie* case for contempt. In *Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal* [1993] 3 CLJ 210 at p. 213; [1993] 1 MLJ 217 at pp. 221-222 it was stated:

> ... leave to issue committal proceedings has been granted. This means that the learned High Court judge has accepted there was a *prima facie* case for contempt against the appellants. It may well be that on the hearing of the motion proper, the appellants will be acquitted of any charge of contempt ... .

Grounds For Which Committal Sought Particularised

[3] The particulars of non-compliance were set out in the statement to show how D1 has failed to comply with the consent judgment – encl. (47).

Liability Of ZH And MS

[4] Order 52 r. 5A of the Rules of the High Court 1980 ('RHC') provides if a corporation is guilty of contempt the court may fine the corporation who caused or wilfully permitted or contributed to the contempt. In this instance D1 being a local authority is a corporation as s. 13 of the Local Government Act 1976 ('Act 171') states every local authority shall be a body corporate. It follows that officers of D1 may be liable for contempt and since the YDP and the secretary are the officers of D1, ultimately they are responsible for the management of D1, and in this instant case, compliance of the consent judgment. It also follows ZH as the current YDP and MS as Secretary may be cited for contempt (alleged contemnors).

[5] Section 10(1) of Act 171 provides a local authority shall consist of the President (YDP) and not less than eight and not more than 24 other Councillors, to be appointed by the state authority. Section 25(1) states that the YDP chairs all meetings of the local authority. In relation to the Secretary, s. 2 states it to mean the Chief Administrative Officer. Hence, although the consent judgment was in D1's name the notice of motion for contempt naming the alleged contemnors was in order as they are the persons responsible for ensuring compliance of the consent judgment. Although ZH was appointed YDP on 17 July 2011, after the consent judgment was entered into, this is not material as he is now responsible by virtue of being the current YDP. The relevant cause papers were served personally on the alleged contemnors.

Protection To ZH And MS

[6] It was submitted that the alleged contemnors as public servants are protected in the discharge of their duties and ss. 31 and 125 of Act 171 were relied on. The aforesaid sections provide:

Validity of acts of local authority officers

31(1) All acts of ... President, ... Secretary ... shall, not withstanding that it be discovered that there was some defect in

A the appointment of any such person or that he was disqualified, be valid and effectual as if such person had been duly appointed and qualified.

Protection ... from personal liability

B 125(1) No matter or thing done ... by the ... President, ... officer ... of the local authority ... shall, if the matter or thing was done ... for the purpose of carrying out the provisions of this Act ... subject him personally to any action, liability, claim or demand whatsoever.

C **[7]** These provisions do not confer such protection. Section 31 deals with the validity of acts of the YDP and the Secretary if their appointments were defective while s. 125 protects them from personal liability.

D **[8]** Sections 6 and 29(2) of the Government Proceedings Act 1956 do not apply as D1 being a local authority does not fall within the interpretation of "Government" in s. 2 which is the Federal and State Governments.

E **[9]** Section 101(p)(ii) of Act 171 is only an enabling provision without more that a local authority can convert the use of buildings. Section 52 of the National Land Code (NLC) on land use does not confer on D1 the power to act contrary to land use approved by the state authority.

F **Section 433B(1) NLC**

[10] It was also raised that the plaintiffs being non-citizens were not in compliance of s. 433B(1)(b) of the NLC thereby disentitling them from coming to court. Section 433(B)(1)(b) provides:

G 433B(1) Notwithstanding anything contained in this Act or in any other written law:

...

H (b) a dealing under Division IV with respect to alienated land or an interest in alienated land may be effected in favour of a non citizen or to a foreign company ...

But only after the prior approval of the State Authority has been obtained upon an application in writing to the State Authority by
I such non citizen or foreign company:

[11] The plaintiffs are Australian citizens who had purchased two units in Kondo Istana *vide* Sale and Purchase Agreements (S&P) dated 22 December 2009 and 28 December 2009 and Deed of

Assignments dated 9 March 2010. No strata titles have been issued. In this regard *Jalaludeen Abdul Aziz v. Thrumalingam S Rajadurai & Anor* [2001] 7 CLJ 578; [2002] 1 MLJ 237 has stated at p 583 (CLJ); p. 243 (MLJ) that "s. 433B(1)(b) of the NLC applies only to 'dealings' and does not apply to a sale and purchase agreement". The Kedah State Lands and Mines Office *vide* letter dated 5 April 2012 (exh. "MM2") in response to a query from the plaintiffs' counsel stated in para. 2:

> ... warganegara asing tidak perlu memperolehi kelulusan Pihak Berkuasa Negeri untuk menyempurnakan Perjanjian Jual Beli dan Suratikatan Penyerahanhak kerana perkara tersebut adalah diluar bidang kuasa pejabat Pengarah Tanah Dan Galian Negeri Kedah. Kelulusan Pihak Berkuasa Negeri hanya perlu diperolehi sekiranya warganegara asing terbabit ingin memperolehi hartanah tersebut dengan mendaftarkan nama mereka di atas surat hakmilik yang berkenaan.

[12] Section 433B(1)(b) of the NLC is not yet applicable as strata titles have not been issued and no approval from state authority is required for S&P and Deed of Assignment. By virtue of the S&P and Deed of Assignment the plaintiffs have acquired rights to the units in Kondo Istana.

Limitation

[13] Section 2(a) of the Public Authorities Protection Act 1948 does not apply as the S&P was entered into in 2009 and the Deeds of Assignment was executed in 2010.

Mode Of Commencement

[14] The issue here is whether the action should have commenced by way of judicial review or relator action. In the plaintiffs' pleadings and affidavits they have asserted their proprietary right of their units in Kondo Istana and their private right have been interfered with. The plaintiffs are applying for various declaratory orders. That being the case, where the plaintiffs seek to protect both proprietary and private law rights an O. 53 application is not appropriate. In *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145 it was stated at pp. 897-898 (CLJ); p. 172 (MLJ):

> We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based

A solely on substantive principles of public law then the appropriate process should be by way of O. 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O. 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority the mode to commence such action under O. 53 of the RHC is not suitable.

[15] With regards to relator action it is in relation to a public nuisance brought by the Attorney General or two or more persons who have obtained the consent of the Attorney General - s. 8(1) of the Government Proceedings Act 1956. However s. 8(2) states that nothing in s. 8 shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

[16] In *UDA Holdings Bhd v. Koperasi Pasaraya Malaysia Berhad and Other Appeals* [2007] 5 CLJ 489; [2007] 6 MLJ 530 it was stated at pp. 523-524 (CLJ); p. 556 (MLJ):

> In my judgment, on the above analysis of facts, the public nuisance collectively caused by the three defendants herein is actionable at the instance of the supermarket whose right of suit is independent of s. 8(1). The concerted acts of the three defendants had inflicted on the supermarket special damage not merely in degree but also different in kind in the exercise or enjoyment of its rights and convenience. Such special damage is over and above that suffered by members of the public generally as users of the road and customers of the supermarket. In the circumstances, the supermarket has succeeded in proving public nuisance on a balance of probabilities against all the three defendants.

[17] The plaintiffs right of action is thus independent of s. 8(1) as their proprietary and private law rights have been affected. Further their claim is founded on a breach of law and not solely on nuisance. Hence a relator action is not appropriate.

Conclusion

[18] For the above reasons the alleged contemnors application in encl. (57) to set aside the plaintiffs application for committal *vide* encl. (52) was dismissed.